92-1519

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CHRIS E. COSNER,
STAFF SERGEANT, UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does due process require that, for peacetime general courts-martial, trial and intermediate appellate judges have the protection of a fixed term of office?

Does the Appointments Clause of the United States Constitution preclude Congress from granting the Judge Advocate General of the Navy the power to appoint judges of general courts-martial and the Navy-Marine Corps Court of Military Review?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Chris E. Cosner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 24, 1992.

OPINIONS BELOW

The published opinion of the United States Court of Military Appeals, *United States v. Cosner*, 35 M.J. 278 (C.M.A. 1992), is reprinted as Appendix A. The order of the United States Court of Military Appeals, denying petitioner's Petition for Reconsideration, *United States v. Cosner*, —— MJ ——, No. 66-735/MC (C.M.A. Dec. 18, 1992) (order), is reprinted as Appendix C, and the unpublished opinion of the Navy-Marine Corps Court

of Military Review, *United States v. Cosner*, No. 88-4389 (N.M.C.M.R. Feb. 11, 1991), is reprinted as Appendix B.

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C.A. Section 1259(3) (West Supp. 1992). On December 3, 1991, the United States Court of Military Appeals granted discretionary review of Petitioner's case, *United States v. Cosner*, 35 M.J. 184 (C.M.A. 1991) (order granting review). On September 24, 1992, the United States Court of Military Appeals entered its decision denying petitioner relief, and on December 18, 1992, the United States Court of Military Appeals denied petitioner's Petition for Reconsideration.

CONSTITUTIONAL PROVISIONS

Article II, Section 2, Clause 2 (the "Appointments Clause") of the United States Constitution provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not otherwise herein provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

At a general court-martial, petitioner pled guilty to multiple counts of rape and sodomy in violation of Uniform Code of Military Justice Articles 120 and 125, 10 U.S.C. Sections 820 and 825 (1988), and to separate

counts of obstruction of justice, kidnapping, and assault with intent to commit murder, in violation of Uniform Code of Military Justice Article 134, 10 U.S.C. Section 934 (1988). The military judge sentenced petitioner to 65 years of confinement, forfeitures of all pay, reduction to pay grade E-1, and a dishonorable discharge. Subsequently, petitioner petitioned the Judge Advocate General of the Navy for a new trial based upon newly discovered evidence that petitioner lacked mental responsibility. That petition was denied.

On February 11, 1991, the Navy-Marine Corps Court of Military Review affirmed most of the findings of guilt, affirmed the sentence, and ordered credit for unlawful pretrial confinement. *United States v. Cosner*, No. 88-4389 (N.M.C.M.R. Feb. 11, 1991).

The United States Court of Military Appeals granted discretionary review to consider four issues raised by petitioner, and on September 24, 1992, that court affirmed the decision of the Navy-Marine Corps Court. *United States v. Cosner*, 35 M.J. 278 (C.M.A. 1992). Petitioner moved for reconsideration, which was denied on December 18, 1992. The issues raised herein were not raised before the courts below.

1. The Institutional Framework

Petitioner's case presents the same issues posited in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), *petition for cert. filed*, 61 U.S.L.W. 3500 (U.S. Dec. 29, 1992) (No. 92-1102), and *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *petition for cert. filed*, —— U.S.L.W. —— (U.S. Mar. 12, 1993) (No. 92-1482), in which the petitioners asserted that the lack of a fixed term of office for those judges of the military trial bench and of the various service Courts of Military Review results in a denial of due process, and that their means of

appointment (by the Judge Advocates General of each armed force) violates the Appointments Clause of the Constitution.

The judicial hierarchy in the United States Armed Forces is unlike that found in any other system. At the lowest level are special and general court-martial judges, each of whom is a commissioned officer on active duty with his respective armed force. 10 U.S.C. § 826 (a). These judges are untenured, have no fixed term, and serve solely at the pleasure of the Judge Advocate General of the armed force to which they are attached, who also appoints them. 10 U.S.C. § 806a. Presently there are 95 general court-martial judges who hear all felony cases in the four branches of the armed forces. In the instant case, petitioner stood trial before Colonel H.R. Sims, USMC, who made findings of guilt as to the offenses, and adjudged petitioner's sentence.

At the first level of appellate review are the four Courts of Military Review, one each for the Navy-Marine Corps, the Air Force, the Army, and the Coast Guard. Presently there are 36 judges of the Courts of Military Review, and although a civilian is not disqualified from sitting as a judge of a Court of Military Review, all but two Coast Guard Court of Military Review judges currently sitting are active duty military officers, appointed statutorily by the Judge Advocates General of each force. 10 U.S.C. § 866(a). Review in the Courts of Military Review, absent a waiver by an accused, is mandatory in all cases in which death, confinement for a year or more, or a punitive discharge is adjudged by a court-martial. 10 U.S.C. § 866(b).

Superior to the Courts of Military Review is the United States Court of Military Appeals, which consists of five civilian judges, appointed by the President with the advice and consent of the Senate. These judges all have fixed terms of office, 10 U.S.C.A. § 1042 (West Supp.

1992). Review in the United States Court of Military Appeals is discretionary, except in cases in which the sentence, as affirmed by the Court of Military Review, extends to death. 10 U.S.C. § 867(d). This case does not challenge the authority of the judges of the United States Court of Military Appeals, but rather deals exclusively with the judges sitting on general and special courts-martial, and those sitting on the Courts of Military Review.

General court-martial judges are, to all intents and purposes, the equivalents of those United States District Court judges and magistrates who sit in federal criminal trials. They may try any offense committed by a member of the armed forces on active duty, *Solorio v. United States*, 483 U.S. 435 (1987), and may adjudge any sentence including death, confinement for life, forfeitures of pay and allowances, reduction in rank, and generally adjudge sentences which include a punitive discharge. 10 U.S.C. § 818. Punitive discharges are a permanent stigma, a badge of dishonor for life, and can have an adverse impact on civilian job opportunities as well as certain government provided benefits. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

In addition to the wide ranging and potentially life terminating powers general courts-martial judges possess, they exercise great discretion in ruling upon interlocutory questions, in instructing the members, or jury, of a court-martial. When sitting without a jury, these judges have total discretion, without regard to federal sentencing guidelines, in determining an appropriate sentence, within the limitations prescribed by the President in the Manual for Courts-Martial, United States, 1984.

Courts of Military review possess "awesome, plenary . . . powers of de-novo review" in all cases which come before them. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). They exercise all of the traditional

powers associated with appellate courts, including those under the All Writs Act. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). They may weigh the evidence, judge the credibility of witnesses, determine controverted questions of fact, and substitute their judgment for that of the trial judge, or jury below.

2. The Petitioner

Petitioner pleaded guilty in a bench trial to numerous offenses, including kidnapping, rape, and sodomy. He was adjudged a sentence which included, *inter alia*, 65 years confinement, and a dishonorable discharge. In accordance with a pretrial agreement, the officer who convened petitioner's court-martial approved only 25 years confinement, and reduced petitioner's forfeitures, approving the balance of the sentence as adjudged.

While his case was pending review before the Navy-Marine Corps Court of Military Review, petitioner was evaluated by Harold Modlin, M.D.,[1] the Nobel Professor of Forensic Psychiatry at the Menninger Institute for signs of Past Traumatic Stress Disorder (hereafter PTSD). After a thorough evaluation, Dr. Modlin offered the opinion that petitioner's case was "one of the clearest cases [he had] seen of otherwise criminal behavior resulting from PTSD as a serious mental disease or defect." Armed with this new evidence, petitioner requested the Judge Advocate General of the Navy to grant him a new

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[1] Dr. Modlin has been a Forensic Psychiatrist for 53 years, is Board Certified in Forensic Psychiatry, Neurology and Psychiatry. He is the past president of the American Board of Forensic Psychiatry and of the American College of Psychoanalysis, the latter organization of which he has been a fellow for 23 years. Since his residency in Psychiatry in 1939, Dr. Modlin has published more than 143 articles in the fields of medicine, law and psychiatry. He is an internationally recognized expert among his peers in the areas of criminal responsibility, the insanity defense, and Post Traumatic Stress Disorder.

trial, which was summarily denied. Petitioner then sought review of that denial in the Navy-Marine Corps Court of Military Review, and without addressing the quality of petitioner's evidence that court denied petitioner any meaningful relief. *See* Appendix B.

The United States Court of Military Appeals granted discretionary review of petitioner's case on four articulated issues of law, and following briefing and oral argument, denied petitioner any relief. *See* Appendix A. Petitioner sought reconsideration of the Court of Military Appeal's decision, which was denied. *See* Appendix C.

Petitioner here raises, for the first time, the constitutional issues relating to the Appointments Clause and a denial of due process. This court is currently considering these issues as presented in the *Graf* and *Weiss* petitions.[2] Thus, petitioner requests that, should this Court grant certiorari in either *Graf* or *Weiss*, that the Petition in this case be granted as well, and that all three cases be consolidated for consideration. Alternatively, Petitioner requests that his case be considered a trailer case to *Graf* and *Weiss* and that any decision regarding petitioner's case be withheld until that Court rules on *Graf* and *Weiss*.

3. Other Cases Pending (*Graf* and *Weiss*)

In *Graf*, the accused was convicted at a general court-martial, based upon his pleas of guilty, to numerous offenses including larceny, conspiracy to commit espionage and larceny, housebreaking, violating Navy Regulations, making a false official statement, possession of marijuana, and attempting to sell military property of the United States. Graf was sentenced to a dishonorable discharge,

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[2] Petitioner incorporates by reference the contents of the petitions submitted in *Graf* and *Weiss*. It is noted that this Court has requested a response from the Solicitor General in *Graf*, after the Solicitor waived his right to reply.

to forfeit pay, to be reduced to paygrade E-1, and to serve five years confinement. His sentence as approved by the authority which convened his court-martial was to serve three years confinement, to receive a bad-conduct discharge and to forfeit some, but not all, of his pay.

Importantly, in *Graf*, the petitioner there conducted *voir dire* of the military judge, a Navy Commander, who acknowledged that he lacked a fixed term of office, and that he served as a military judge pursuant to orders from the Chief of Naval Personnel. The military judge was challenged for cause by the defense, which argued that his failure to have a fixed term of office denied Graf due process of law.

Before the Navy-Marine Corps of Military Review, Graf alleged an error by the military judge in refusing to recuse himself, and challenged the military appellate judges on the basis that they also lacked fixed terms of office. That court rejected Graf's arguments, and affirmed the findings and sentence of his court-martial.

The United States Court of Military Appeals granted discretionary review of Graf's case, and affirmed the decision of the lower court, finding that "in view of other guarantees of independence provided for military judges in the [UCMJ] court-martial judges can independently and fairly perform their duties without protection of a fixed term of office . . . ." *Graf*, 35 M.J. at 463.

Weiss began as a special court-martial, in which Weiss pled guilty before a military judge sitting alone, to one count of larceny. Weiss claimed that he was denied due process, in the same manner as the issue was raised in *Graf* and that the Appointments Clause of the Constitution was violated in that military judges are appointed by the Judge Advocates General of each armed force, rather than by the President with consent of the Senate as required by Article II. The Navy-Marine Corps Court of

Military Review affirmed *Weiss* without opinion, and the United States Court of Military Appeals granted discretionary review on both issues.

On December 24, 1992, the United States Court of Military Appeals issued its decision in *Weiss*, affirming the United States Navy-Marine Corps Court of Military Review. Notably, however, two of the five judges on the Court of Military Appeals found no broad exemption to the strictures of the Appointments Clause based on the status of a military judge as either a military officer or as a military lawyer. *Weiss*, 36 M.J. at 247, 261-62 (Sullivan, C.J., and Wiss, J., dissenting). In contrast, the lead opinion held that military judges must be appointed in accordance with the Appointments Clause, either by the President with advice and consent of the Senate, by the President alone, by a Head of Department, or by a Court of Law. *Id.* at 225-26 (per Gierke, J., with Cox, J., concurring and Crawford, J., concurring on the result). Judge Gierke, writing for himself and Judge Cox, held that this requirement was satisfied by virtue of the fact that military judges are commissioned officers, appointed by the President with advice and consent of the Senate, and so are merely military officers with legal training. *Id.* at 227-28 (per Gierke, J., with Cox, J., concurring). Judge Crawford, concurring in the result, held that the appointment of military officers as Judges need not comply with the Appointments Clause because of the special deference given to Congress when it regulates the land and naval forces. *Id.* at 239-40 (Crawford, J., concurring in the result). As to the due process issue, the court refused to revisit the issue it addressed in *Graf*, where the court held that due process does not require fixed terms of office for military trial and appellate judges. *See id.* at 225 n.1.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED IN *GRAF* AND *WEISS* APPLY EQUALLY TO THIS PETITIONER

This petition seeks certiorari on the same two issues currently pending in *Graf* and *Weiss*. Petitioner is one of thousands of military members tried by courts-martial every year[3] and in fiscal year 1991, the Courts of Military Review decided 5183 appeals from General and Special Courts-Martial.[4]

II. PETITIONER HAS NOT WAIVED THE ISSUES

Although petitioner did not raise either issue before the courts below, this Court should not treat them as waived or forfeited, since this Court "has exercised its jurisdiction to consider nonjurisdictional claims that have not been raised below" as recently as 1991 in *Freytag v. Commissioner of Internal Revenue*, 111 S.Ct. 2631, 2647 n.2 (1991) (Scalia, J., concurring). There, this Court, citing *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), stated that "*Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Id.* at 2639. Because of the importance of both issues to the military justice system and the rule of Constitutional law, this Court should grant certiorari on both issues.

Indeed, as to both the due process and the Appointments Clause issues, it is noted that the Military Justice Act of 1983, which established this Court's certiorari jurisdiction over decisions of the United States Court of Military Appeals, limited this Court's certiorari jurisdic-

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[3] There were 2610 General Courts-Martial in fiscal 1991. Annual Report on Military Justice, 34 M.J. CVII, CV, CXIX, CXXXII, CXLII (1991).

[4] *Id.*

tion to cases in which the Court of Military Appeals exercised: (a) mandatory jurisdiction; (b) cases in which that Court granted review, and; (c) other cases in which that Court granted relief. Military Justice Act of 1983, § 10(a)(1), 97 Stat. 1405, 1406 (1983) (codified at 28 U.S.C.A. § 1259 (West Supp. 1992)); *see also* 10 U.S.C.A. § 867a (West Supp. 1992). The Military Justice Act of 1983's legislative history indicates, "In view of current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review." H.R. Rep. No. 549, 98th Cong., 1st Sess. 16-17 (1983). The number of cases subject to review is the same, regardless of whether this Court's certiorari jurisdiction is limited to issues actually considered by the Court of Military Appeals. Thus, the limitation's purpose was apparently not to insulate certain issues from review by this Court, but rather to prevent an intolerable increase in this Court's workload. This Court may, in the exercise of its judicial discretion, review any issue in a case, such as that presented here, which meets the statutory requirements of 28 U.S.C.A. Section 1259. In any event this Court should not apply waiver to the Appointments Clause issue given its prior holding in *Glidden*.

III. THE APPOINTMENTS CLAUSE ISSUE

The Appointments Clause is recognized as precluding Congress from vesting the power to appoint inferior officers to anyone other than the President, a Court of Law, or the Heads of Departments. *Freytag*, 111 S.Ct. at 2642. It is not disputed that in the military, trial and Court of Military Review judges are all appointed by the Judge Advocates General of the respective force, who also writes fitness reports for these officers, and are the ultimate reporting senior for all military prosecutors. Thus, the issue raises serious questions about judicial independence that go to the heart of military justice.

In its decision in *Weiss*, a majority of the judges of the Court of Military Appeals agreed that military judges are officers of the United States, subject to the appointments clause. The issue is whether their appointments as military officers will suffice for their appointment as judges within the meaning of Article II, Section 2 of the Constitution. Petitioner otherwise defers to the arguments made in the *Weiss* petition for additional support.

IV. THE DUE PROCESS ISSUE

This issue, like that raised above, raises fundamental questions about judicial independence that lie at the most basic levels of military justice. It is not disputed that uniformed trial and appellate judges of the four branches of our armed forces sit without tenure, and may be removed by the Judge Advocate General of their force at will. In the Navy-Marine Corps, the annual fitness reports of judges (upon which all future promotions and future assignments of the subject judge are dependent) are also written or approved finally by the Judge Advocate General of the Navy.

In *Graf*, the Court of Military Appeals held that fixed terms of office are not integral to judicial independence and may be dispensed with because of other "protections" which exist [5] and provide the constitutionally guaranteed judicial independence servicemembers are entitled to expect. Petitioner asserts that the rationale utilized by the Court of Military Appeals in *Graf* disregards the gravity of "a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental", *Medina v. California*, 112 S.Ct. 2572, 2577 (1992) (cit-

[5] The court held that various provisions of the Uniform Code of Military Justice such as Articles 6a, 26, and 37, 10 U.S.C. Sections 806a, 826, and 837 (1988), as well as decisional law such as *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991), provide sufficient protection to an accused of the constitutionally guaranteed judicial independence.

ing *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Finally, petitioner notes that the Court of Military Appeals failed, in *Graf*, to justify its variation from the civilian norm wherein fixed terms of office are a basic requirement for the judiciary [6]. The necessity for such a justification would appear to be compelling where the convicted service member forfeits far more by court-martial conviction [7] than does his civilian counterpart.

CONCLUSION

Petitioner requests that if this Court grants certiorari in the *Weiss* or *Graf* cases, that it be granted in this case on either or both issues asserted since, although this petitioner did not raise them below, he is similarly situated as the petitioners in both of those cases, having been convicted and sentenced by the same military judiciary. Alternatively, petitioner requests that this Court abate consideration of this Petition until the Court rules on whether or not it will grant certiorari in either *Graf* or *Weiss*, and thereafter consolidate this case with either of those two cases for further proceedings.

Respectfully submitted,

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[6] The burden is on the government to justify such variations. *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).

[7] Imprisonment, forfeitures of pay, a lifelong stigmatizing punitive discharge, and loss of a career are all consequences of a court-martial sentence. A civilian felon suffers only imprisonment and the occasional financial penalty at his trial.

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 66,735

NMCM 88 4389

UNITED STATES,

Appellee,

v.

CHRIS E. COSNER, Staff Sergeant
U.S. Marine Corps,

Appellant.

Argued April 9, 1992

Decided Sept. 24, 1992

For Appellant: *Dan R. Hyatt* (argued); *Lieutenant Peter Van Hartesveldt*, JAGC, USNR (on brief); *Major Joseph B. Gilbert*, USMC, *Captain Michael K. Schaller*, USMC, *Lieutenant Robert E. Wallace*, JAGC, USNR, *Lieutenant Michael C. Pallesen*, JAGC, USNR.

For Appellee: *Major Laura L. Scudder*, USMC (argued); *Colonel T.G. Hess*, USMC (on brief); *Commander Thomas W. Osborne*, JAGC, USN.

Opinion of the Court

WISS, Judge:

At a general court-martial before a military judge alone, appellant was convicted, in accordance with his pleas, of rape (2 specifications), forcible sodomy (2 specifications), obstruction of justice, kidnapping, and assault

with intent to commit murder, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 920, 925, and 934, respectively. He was sentenced to a dishonorable discharge, confinement for 65 years, forfeiture of all pay (but not allowances), and reduction to the lowest enlisted grade.

Pursuant to a pretrial agreement, the convening authority approved the findings and sentence, except for the forfeitures, and suspended all confinement in excess of 25 years for the period of confinement served and 1 year thereafter. The Court of Military Review in an unpublished opinion affirmed the findings and the sentence as approved by the convening authority, except that it modified the obstruction-of-justice specification to one of communicating a threat to kill.

On appellant's petition to this Court, we granted review of four issues of law. Now, after full consideration of these issues, we affirm the decision below.[1]

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[1] Review was granted of the following issues:

Issue I

WHETHER THE FINDING THAT APPELLANT DID NOT, AT THE TIME OF THE OFFENSES, SUFFER FROM POST TRAUMATIC STRESS DISORDER WAS CLEARLY ERRONEOUS AND WAS NOT SUPPORTED BY THE EVIDENCE TO THE SUBSTANTIAL PREJUDICE OF APPELLANT.

Issue II

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ABUSED ITS DISCRETION IN DENYING APPELLANT'S PETITION FOR NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE RELATING TO MENTAL RESPONSIBILITY.

Issue III

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW IN DETERMINING APPELLANT'S MENTAL RESPONSIBILITY ON A DE NOVO REVIEW WHERE A SUBSTANTIAL ISSUE

I

Before discussing the legal issues stated and implicit in the granted issues that were framed by appellant, a brief background as to how these issues arose will help put them in proper focus.

Appellant's victim was the wife of a fellow Marine. After observing and stalking his victim, he forced her at gunpoint to drive him to an isolated area where he raped her, forcibly sodomized her both orally and anally, otherwise assaulted her, and threatened to kill her if she reported these crimes. Having negotiated a pretrial agreement, appellant pleaded guilty at trial to all of these charges, except for contesting that the assault was committed with the intent to murder. After the prosecution elected to pursue this greater assault, the military judge returned a finding consistent with the allegation.

Prior to trial, appellant was examined by a Navy psychologist and a defense-selected civilian psychiatrist. During his interview of appellant, the psychiatrist read portions of a diary that appellant had kept while in Beirut, Lebanon. Neither expert uncovered any basis for believing that appellant lacked mental responsibility for his acts. *See* Art. 50a, UCMJ, 10 USC § 850a.

While appellant's conviction was pending review by the Court of Military Review, yet another civilian psy-

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HAD BEEN RAISED POST TRIAL BY NEWLY DISCOVERED EVIDENCE.

Issue IV

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED IN FAILING TO AT LEAST REMAND APPELLANT'S CASE FOR A REHEARING ON SENTENCE WHERE NEWLY DISCOVERED EVIDENCE POST TRIAL DISCLOSED A MATTER IN EXTENUATION OF THE OFFENSES WHICH EXISTED AT THE TIME OF THE OFFENSES BUT WHICH HAD BEEN UNDISCOVERED.

chiatrist, retained by the defense, examined appellant. During this examination, appellant contends that what the Government characterizes as the first "true story" of his traumatic experiences in Lebanon came out—details that he admits he intentionally had omitted from his diary and had kept hidden from everyone else. After this examination, the new psychiatrist opined that appellant was suffering from a post-traumatic stress disorder (PTSD)[2] at the time of the offenses.

On this basis, appellant petitioned the Court of Military Review for a new trial founded upon "newly discovered evidence." In disposing of both the petition for new trial and a related contention made during the usual appeal, the Court of Military Review held as follows:

> We believe that the grounds asserted for a new trial have been categorically refuted by the Government Answer to the Petition for a New Trial. On the basis of the highlighted facts and compelling arguments presented therein, *we are convinced beyond a reasonable doubt that a reasonable trier of fact, if presented with all available evidence, old and new, would not find by clear and convincing evidence that the petitioner-appellant lacked mental responsibility at the times of his offenses.* We are similarly convinced that a reasonable trier of fact would find that

---

[2] The traumatic experiences in Lebanon giving rise to the opinion of PTSD centered around instances of brutal killings by Moslems which appellant had witnessed, the mayhem to which he was exposed after the American Embassy bombing in Beirut, and his encounters with Moslem terrorists—including a woman named "Mohtraman," who systematically taunted and threatened appellant to provoke a justification for killing him. Citing Sparr and Atkinson, *Post-Traumatic Stress Disorder as an Insanity Defense: Medicolegal Quicksand,* 143 American Journal of Psychiatry 608-13 (May 1986), appellant argues that PTSD involves unconscious flashbacks, "unpremeditated and sudden" behavior, "amnesia for all or part of [an] episode," behavior lacking "current motivation," and "fortuitous or accidental" choice of victims in crimes. *Id.* at 611.

> the petitioner-appellant did not suffer from a mental disease or defect, and, hence, that the newly developed information would not change the result regarding the specific intent element of the assault with intent to commit murder. Likewise, we are convinced beyond a reasonable doubt of the guilt of the petitioner-appellant, notwithstanding the newly developed information. Accordingly, the petition for a new trial is denied, and Assignment of Error III is rejected.

Unpub. op. at 3 (emphasis added).

II

In this light and from the context of appellant's brief in support of the four issues raised by him on which this Court granted review, we now synthesize the questions before us as follows:

> First, did the Court of Military Review apply the correct legal standard in determining whether to order a new trial based on appellant's new psychiatric evidence?
>
> Second, if so, in applying that standard, did the court abuse its discretion in concluding that a new trial was not warranted?
>
> Finally, in any event was appellant somehow entitled to a rehearing on his sentence, at which this new psychiatric evidence could be considered?

A

In *United States v. Dock*, 28 MJ 117 (CMA 1989), this Court had occasion to address the standard to be applied by the Court of Military Review "in determining whether the issue of insanity was adequately raised . . . post-trial." *Id.* at 119. After reviewing and affirming language in *United States v. Lilly*, 25 MJ 403, 407-08

(CMA 1988), and *United States v. Triplett*, 21 USCMA 497, 503, 45 CMR 271, 277 (1972), we offered "[a]nother way" of stating the test:

> Is the appellate court convinced beyond a reasonable doubt that a different result would not obtain if the trier of fact had this new evidence before it?
>
> If it is not so convinced, the accused is entitled to present his evidence before a court-martial.

28 MJ at 120.

Dock had committed his crimes in 1984, before Congress had amended the Uniform Code of Military Justice, effective for offenses committed on or after November 14, 1986, by passing Article 50a. Under the law applying to Dock, an accused's mental responsibility was a matter that the Government had to prove beyond a reasonable doubt. RCM 916(k)(3)(A), Manual for Courts-Martial, United States, 1984 (original version).

Article 50a, though, made lack of mental responsibility an affirmative defense that must be raised by the accused and proven by him by clear and convincing evidence. *United States v. Ramsey*, 28 MJ 370, 371 n. 2 (CMA 1989). *See* RCM 916(k) (Change 3, effective March 12, 1987). Appellant committed the crimes that are the subject of this appeal on August 30, 1988; therefore, under Article 50a, it would be his affirmative burden to prove his lack of mental responsibility for his crimes by clear and convincing evidence.

Thus, when the standard we articulated in *Dock*—for how an appellate court must determine whether an accused has adequately raised mental responsibility as an issue on appeal—is overlaid upon the requirement of Article 50a—for what an accused must prove if he does get a rehearing on the issue—the test may be stated in the form of this question: *Is the appellate court convinced beyond a reasonable doubt* that *reasonable fact-*

finders would not find by clear and convincing evidence that, at the time of the offense, appellant suffered from "a severe mental disease or defect" such as to be "unable to appreciate the nature and quality or the wrongfulness of" his acts? (Emphasis added in quoted matter.)

As is apparent, this is exactly the standard used by the Court of Military Review here: "[W]e are convinced beyond a reasonable doubt that a reasonable trier of fact, if presented with all available evidence, old and new, would not find by clear and convincing evidence that the petitioner-appellant lacked mental responsibility at the times of his offenses." Unpub. op. at 3. Contrary to appellant's assertion in this Court, the Court of Military Review did not decide his mental responsibility *de novo*, as a matter of fact. Rather, viewing appellant's evidence in its best light and finding that his appellate evidence placed the issue of his mental responsibility in the "gray area," *see United States v. Triplett, supra, quoted with approval in United States v. Lilly* and *United States v. Dock*, both *supra*, the court nonetheless found beyond a reasonable doubt that reasonable factfinders, veiwing the totality of the evidence, would not be convinced by clear and convincing evidence that appellant lacked metal responsibility for his crimes.

B

The next question is whether the Court of Military Review, in applying this standard, abused its discretion when it held that appellant was not entitled to a new trial.

> It must be remembered that the determination of sufficient grounds for granting a petition for new trial in the military rests "within the [sound] discretion of the authority considering . . . [that] petition." In exercising their discretion, the Courts of Military Review have the "prerogative" of weighing

> "testimony at trial against the" post-trial evidence "to determine which is credible."

United States v. Bacon, 12 MJ 489, 492 (CMA 1982) (citations omitted).

Although the Court of Military Review did not set out specifically the other evidence of record that it considered in reaching its decision, it did generally state that appellant's asserted grounds "have been categorically refuted by the Government Answer to the Petition for a New Trial." Unpub. op. at 3. That brief by the Government referred to what had come from appellant's own mouth at trial that made clear that he remembered virtually all of the material details of his crimes—notwithstanding a supposed inability to remember such details if suffering a post-traumatic stress disorder. It referred to several clear reflections that appellant had not confused his victim with a woman he had known in Beirut who purportedly was a trigger for PTSD reactions. It referred to such actions as threatening his victim with death if she revealed his crimes and to steps he took right after the crimes to change his appearance to avoid identification—again, factors inconsistent with a diagnosis of PTSD.

Finally, that brief pointed out that, even if appellant did suffer the disorder he claimed, all this evidence points persuasively to a conclusion that he was not "unable to appreciate the nature and quality or the wrongfulness of" his acts, as Article 50a would require him to demonstrate to the factfinders by clear and convincing evidence. Under these circumstances, we do not believe that the Court of Military Review abused its "broad discretion" in holding that appellant had not met the standard entitling him to a rehearing. *See United States v. Bacon*, *supra* at 492.

C

Pointing to language in *United States v. Lilly*, *supra* at 409, appellant argues finally that, even if the court below applied the correct standard and even if it did not abuse its discretion in determining, under that standard, that appellant was not entitled to a new trial on the merits, the court nonetheless erred by not ordering a rehearing on sentence at which this new mitigating evidence could be considered. We do not agree.

Appellant has pointed to no statute, no case, no regulation, and no Manual provision that would suggest that the Court of Military Review must use a more generous approach to deciding a petition for a sentence rehearing than the court used here to resolve his petition for new trial. Moreover, with the new evidence before it, the court indicated no doubt whether the trial sentencer would have adjudged a more lenient sentence. Finally, with its own power to determine the appropriateness of the sentence, Art. 66(c), UCMJ, 10 USC § 866(c), it nevertheless affirmed the sentence approved by the convening authority—and recall that the approved sentence to confinement was 40 years less than the confinement adjudged at trial.

III

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

KENT A. WILLEVER R. A. STRICKLAND J. A. FREYER

UNITED STATES

v.

CHRIS E. COSNER, 481 78 6916
Staff Sergeant (E-6), U.S. Marine Corps

NMCM 88 4389 Decided 11 February 1991

Sentence adjudged 2 December 1988. Military Judge: H. R. Simms. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Force Service Support Group (Rein), FMF, Atlantic, Camp Lejeune, NC 28542-5701.

DAN R. HYATT, Esquire, Civilian Defense Counsel.

LT ROBERT E. WALLACE, JAGC, USN, Appellate Defense Counsel.

Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel.

LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel.

FREYER, Judge:

Petitioner-appellant stalked, then abducted at gunpoint, the wife of a private first class and, in a secluded loca-

tion on board the Camp Lejeune Marine Corps Base, assaulted, raped, sodomized, and threatened to kill her. He eventually released her and took several actions, including dyeing his hair and changing the grips on his handgun, which were calculated, but failed, to enable him to evade detection. He was found guilty, in accordance with his negotiated pleas, of two rapes, forcible oral and anal sodomy, obstruction of justice by communicating a threat, and kidnaping; and, notwithstanding his plea to only simple assault as a lesser-included offense, he was also found guilty of assault with intent to commit murder with a loaded firearm. He was sentenced to dishonorable discharge, reduction to pay grade E-1, forfeiture of all pay (but not allowances), and confinement for 65 years. The convening authority disapproved the forfeiture of pay and suspended confinement in excess of 25 years for the period of confinement and one year thereafter.

Aided by a newly retained civilian counsel and the results of a post-trial psychiatric examination by a newly retained civilian psychiatrist, petitioner-appellant initially sought a new trial on the ground that his offenses were due to post-traumatic stress disorder caused by his exposure to atrocities occurring in Lebanon in the mid-1980's, and that such disorder constituted a mental disease or defect by reason of which petitioner-appellant was, at the time of the offenses, unable to appreciate the nature or quality of his acts or their wrongfulness. His petition was duly referred to this Court, which had acquired jurisdiction over the case for appellate review. After hearing oral argument on the petition, we reserved decision pending submission of the case with assignments of error and briefs. The case is now ripe for decision.

We have given most careful consideration to the affidavits of the petitioner-appellant and Dr. Modlin in support of the petition for a new trial and also Assignment of Error III. This Court recently had occasion to analyze

the current applicability of the standard of review set forth in *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989), since the enactment of Article 50a, Uniform Code of Military Justice, 10 U.S.C. § 850a (1986); in so doing, the Court wrote as follows:

> Because of the state of the law regarding mental responsibility at the time of Dock's crimes, *Dock* imposed a "beyond a reasonable doubt" standard on two levels: In order to deny a petitioner a new trial when confronted with evidence suggesting lack of mental responsibility, an appellate court must be "convinced beyond a reasonable doubt that a different result would not obtain if the trier of fact had the new evidence before it"; and, since a "different result" would obtain under the law at that time if the new evidence merely raised in the trier of fact a reasonable doubt as to such petitioner's mental responsibility, the appellate court was required to find beyond a reasonable doubt that the trier of fact would have no reasonable doubt of such petitioner's mental responsibility notwithtanding the new evidence.
>
> Under the law in effect when our petitioner comimtted his offenses, lack of mental responsibility was, and is, an affirmative defense as to which the accused has the burden of persuasion by clear and convincing evidence. Article 50a, Uniform Code of Military Justice, 10 U.S.C. § 850a; *United States v. Ramsey*, 28 M.J. 370 (C.M.A. 1989). When *Dock* is applied under the new law, we think that the first level of "beyond a reasonable doubt" remains, *i.e.*, that *this Court* still must be convinced beyond a reasonable doubt; but what we must be convinced of beyond a reasonable doubt has changed. No longer is it that the trier of fact would have no reasonable doubt of the petitioner's mental responsibility; now

> we must be convinced beyond a reasonable doubt that the petitioner could not persuade the trier of fact of his lack of mental responsibility by clear and convincing evidence. In other words, as long as this Court is convinced beyond a reasonable doubt that the combination of old and new evidence would fail to establish by clear and convincing evidence, in the mind of a reasonable trier of fact, the appellant's lack of mental responsibility, we should now deny the petition for a new trial with respect to offenses occurring on or after 14 November 1986.

United States v. Billingsley, —— M.J. ——, No. 89 4233 (N.M.C.M.R. 31 December 1990).

We believe that the grounds asserted for a new trial have been categorically refuted by the Government Answer to the Petition for a New Trial. On the basis of the highlighted facts and compelling arguments presented therein, we are convinced beyond a reasonable doubt that a reasonable trier of fact, if presented with all available evidence, old and new, would not find by clear and convincing evidence that the petitioner-appellant lacked mental responsibility at the times of his offenses. We are similarly convinced that a reasonable trier of fact would find that the petitioner-appellant did not suffer from a mental disease or defect, and, hence, that the newly developed information would not change the result regarding the specific intent element of the assault with intent to commit murder. Likewise, we are convinced beyond a reasonable doubt of the guilt of the petitioner-appellant, notwithstanding the newly developed information. Accordingly, the petition for a new trial is denied, and Assignment of Error III is rejected.

Assignment of Error II challenges the military judge's acceptance of a plea of guilty to obstruction of justice based on the appellant's threat to kill the victim, uttered at the scene of the crimes, if she reported the matter.

In light of our decision in *United States v. Rexach*, No. 89 2184 (N.M.C.M.R. 9 March 1990), the Government has conceded the invalidity of this spurious charge but has recommended affirmance thereunder of the lesser-included offense of wrongfully communicating a threat. We find the Government's recommendation meritorious and shall take action accordingly.

Assignment of Error I ascribes error to the military judge's denial of the appellant's motion for additional credit for conditions of his pretrial confinement claimed to be illegal. The record reflects that, even after his initial screening, the appellant, a staff sergeant with a clear disciplinary record since 1980, was maintained in a maximum custody status solely on the basis of the severity of the confining offenses.

Appellate Exhibit I contains excerpts from the Department of the Navy Corrections Manual, Secretary of the Navy Instruction 1649.9A (hereinafter, "Corrections Manual"). Paragraph 4201.3.a. sets forth in general terms the criteria for maximum custody, which include those who are "dangerous or violent." While the nature of the confining offenses is not explicitly enumerated as a distinct criterion in paragraph 4202.4, the nature of such offenses manifestly serves, at least to some extent, to characterize the perpetrator thereof, and, to that extent, it is implicitly subsumed in many of the enumerated criteria. In this case, the confining offenses were barbaric, involved deadly weapons, indicated a high level of emotional instability, and were followed by desparate efforts to evade detection. Moreover, the available evidence presented a high degree of probability that the appellant was the perpetrator thereof. Since the nature of the confining offenses characterized the appellant as "dangerous and violent," we are unable to conclude that the classification of the appellant as a maximum custody detainee was an abuse of discretion.

That is, however, not the end of the matter. The evidence also reflects the appellant was placed in physical restraints within the confines of the brig whenever he was removed from his cell. Paragraph 4309.3. of the Corrections Manual provides in relevant part:

> Instruments of restraint are not normally authorized to be used within the security perimeter of the brig except when preparing to move a prisoner outside the facility, or to regain control during a disorder, or when a prisoner is violent and self-destructive.

Finding no justification for the excessive use of physical restraints in this case, we award a judicially ordered credit of one day for each day of pretrial confinement against the unsuspended sentence to confinement, in accordance with *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983).

Under Specification 1 of Charge IV, only so much of the finding of guilty as finds that the appellant, at the time and place alleged, wrongfully communicated to Cathy Ann Sawyer a threat to kill her is affirmed. The remaining findings of guilty and, upon reassessment pursuant to *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), the sentence, as approved on review below, are affirmed.

J. A. FREYER

Chief Judge WILLEVER and Senior Judge STRICKLAND concur.

KENT A. WILLEVER

(Absent/Concurs)

R. A. STRICKLAND

NMCM 88 4389

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USMCA Dkt. No. 66735/MC
CMR Dkt. No. 88-4389

UNITED STATES,
Appellee

v.

CHRIS E. COSNER (481-78-6916),
Appellant

ORDER

On consideration of appellant's motion for leave to file a petition for reconsideration out of time and motion to allow filing of reply to appellee's answer in opposition to petition for reconsideration, it is, by the Court, this 18th day of December, 1992,

ORDERED:

That the motion to file petition for reconsideration out of time is hereby grant [sic];

That the motion to allow filing of reply is hereby granted; and

That the petition for reconsideration is hereby denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

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Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

No. 92-1519

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHRIS E. COSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have fixed terms of office.

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1519

CHRIS E. COSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-9a, is reported at 35 M.J. 278. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 10a-15a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 24, 1992. A request for reconsideration was denied on December 18, 1992. Pet. App. 16a. The petition for a writ of certiorari was filed on March 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, pleaded guilty to two counts of rape, two counts of forcible sodomy, obstruction of justice, kidnapping, and assault with intent to commit murder, in violation of Articles 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 925, and 934. Petitioner was sentenced to confinement for 65 years, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay grade. The convening authority approved the findings and sentence and suspended all confinement in excess of 25 years, pursuant to the terms of a pretrial agreement. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence, with the exception of the obstruction of justice count, which was modified to one count of communicating a threat to kill. The Court of Military Appeals granted petitioner's request for review on several issues not presented in the certiorari petition, see Pet. App. 2a-3a n.1, 5a, and affirmed the judgment of the court of military review.

ARGUMENT

Petitioner presents two claims. First, he argues that the military trial and appellate judges in his case were not qualified to hold those positions because they were appointed to them by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Second, he claims that his trial and his appeal to the court of military review were fundamentally unfair because the military judges sitting on those courts do not

enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges. Neither claim warrants review by this Court.

1. Petitioner has not properly preserved his claims for review by this Court. Petitioner did not raise either claim with regard to the trial judge at or before trial and therefore has waived them under the rules of military procedure. See Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States —1984*, at II-109.[1] In addition, petitioner did not raise in the court of military review or the Court of Military Appeals any claim challenging the qualifications of the trial judge or the judges of the court of military review. Finally, no military court addressed those claims. Petitioner therefore cannot raise those claims for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s].")

---

[1] Rule 905(e) provides as follows:

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

(quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[2]

2. On the merits, petitioner's claims are not materially different from the claims raised by the petitioners in *Graf* v. *United States*, No. 92-1102, and *Weiss* v. *United States*, No. 92-1482. We have already responded to those claims in our briefs in opposition in those cases. We rely on those responses here.[3]

---

[2] The Court of Military Appeals did not grant review on these questions. Accordingly, it is not clear that they are subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) and 28 U.S.C. 1259(3) (1988 & Supp. III 1991), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a), UCMJ, 10 U.S.C. 867a(a), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit its decisions in any case to less than all the issues urged by the accused. Art. 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. III 1991). Since petitioner did not raise these issues for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issues that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the questions presented in the certiorari petition do not warrant review by this Court in any event.

[3] We have supplied petitioner's counsel with a copy of our briefs in opposition in *Graf* and *Weiss*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

THEODORE G. HESS
Colonel, USMC

LAURA L. SCUDDER
Major, U.S. Marine Corps
Appellate Government Counsel
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APRIL 1993